Supreme Court, U.S.
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No. 92-1029

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SAM SKURNICK,

Petitioner,

v.

AL AINSWORTH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

So that the facts of this case may be fairly and accurately recorded for the record, I take exception to the following statements and arguments in the Respondent's Brief in Opposition (Br. in Opp.).

The Respondent's first sentence is a half-truth in that he represents that the reason for my appeal from the district court's order was merely because it vacated the Arbitration award. The district court also issued a judgment against me that modified the arbitration award on none of the grounds specified in 9 U.S.C. § 11, and which did not conform to the intent of the arbitrators.

The last sentence in his second paragraph says: "While it is true that Ainsworth was, at all times, *deaf*, the record summary of Skurnick's activities *in Florida* are." (Emphasis is mine at all times.)

Here Respondent's attorney (Forkey) admits that Ainsworth was "*at all times, deaf.*" The question therefore arises why he prepared a verified complaint for Ainsworth to sign which stated: "Prior to January, 1984, the Claimant *through conversation* advised the Respondent of the following facts:" He then proceeded to list five fraudulent representations that he alleged Ainsworth made to me, and five misrepresentations that I made to Ainsworth in these alleged conversations that never took place.

Here, and in another case of which I have direct knowledge, is revealed Forkey's practice to prepare fictitious representations in *verified* complaints for which he obtained his clients' signatures. He apparently worked on the theory since these fictitious representations were made in *conversations*, if they were questioned, it would be a case of his client's word against that of the Respondent's. In this particular case he was unaware of the fact that Ainsworth was deaf when he prepared the fictitious complaint for Ainsworth's signature.

I object to the numbered items 1-34 (Br. in Opp. pp. 2-6) as being described as "Skurnick's activities *in* Florida."

Item 26 states: "*Skurnick received commissions on all transactions effectivated in Ainsworth's account.*" This confirms my claim that I acted in the capacity of a "broker" for all transactions on behalf of Ainsworth, and none in the capacity of a dealer who buys or sells stocks as a principal without commission charges.

On page 7 Forkey says that Florida § 517.02(9)(a)1 states that "broker" means "dealer". This would indicate that in Florida a "broker" is a "dealer" despite the fact that the U.S. Securities Exchange Act of 1934 differentiates between a "broker" and a "dealer," and this differentiation is used and recognized throughout the securities industry.

However, § 517.021(9)(b)5 of the Florida Statutes of 1985, which was in effect during my association with Ainsworth, states: "The term 'dealer' does *not* include the following: Any person buying and selling exclusively through a registered dealer or stock exchange:" Since all stocks purchased and sold by me for Ainsworth's account were executed on The New York Stock Exchange, I was not a dealer according to 1985 Florida statutes.

Subsequent to 1985 the provisions of Florida Statute § 517.021(9)(b)5 was changed and this "*ex post facto*" law was the basis for the Eleventh Circuit Panel stating in its certification request, "there appears to be no doubt that Skurnick acted as a securities dealer for Ainsworth within the meaning of Fla. Stat. § 517.021(9). Florida statute § 517.021 (9)(b)5 in effect at the time, creates at the very least a *doubt* that according to Florida law I acted as a "dealer" in securities.

Br. In Opp. p. 8 states: "Skurnick has misstated what transpired concerning the exhibits introduced by Ainsworth during this proceeding. Prior to the non-jury trial taking place, the parties filed a joint pre-trial stipulation wherein Ainsworth listed *as possible exhibits* he would introduce '*all* exhibits introduced in the arbitration hearing.' "

I misstated nothing. *Respondent here misrepresents the facts.*

The stipulation agreed upon was that Ainsworth would submit "2. All exhibits introduced in the Arbitration Hearing . . ." The stipulation made no reference whatsoever to "possible exhibits he would introduce." All exhibits clearly included the arbitrators' exhibit which was introduced into the hearing as "Arbitrators' exhibit No. 1." This exhibit included both parties' agreement to accept the panel's decision as *final*, the verified complaint, my detailed answer to the complaint, and sixteen supporting exhibits to support my answer.

Since the purpose of the trial was to determine whether the award should be vacated because of the alleged evident partiality by the arbitrators or their alleged manifest disregard of the law, was it not necessary for Ainsworth to include the arbitrators' exhibit so that the basis of their award could be judged fairly? For all practical purposes it was a trial on the conduct of the arbitrators. The transcript of the hearing, and the exhibit they presented at the hearing, were the only documents capable of defending the arbitration panel against the false allegations made against them by the Respondent.

Br. in Opp. p. 9 states "any failure by Skurnick to introduce what he deemed to be appropriate exhibits was his own fault." I had already introduced by exhibits to the arbitrators when I answered the Respondent's complaint. These in turn were introduced as evidence at the arbitration hearing. I was not on trial. When they placed their exhibit in evidence at the arbitration hearing the arbitrators provided a basis for their award.

I ask the members of this Court to consider if they had been the judge at the district court whether they would have considered rendering a decision that reflected misconduct on the part of the arbitrators without first examining their exhibit which formed the basis of their award. Did the Petitioner at the district court level properly comply with the legal requirements for proper review of his case without submitting to the Court the arbitrators' exhibit for its consideration?

Br. in Opp. p. 11 states he filed a memorandum of law, "*claiming evident partiality by the arbitrators because of a failure to take additional evidence*;"

At the conclusion of the arbitration hearing the chairman of the panel asked: "Now, if the parties do not have any further proof to offer, please state affirmatively that you have had an equal opportunity to be heard."

I replied; "I feel I have had an equal and proper opportunity to be heard." Mr. Forkey answered, "*Claimant feels likewise.*" On the basis of Forkey's reply to the arbitration panel chairman's question, his suggestion that the arbitrators were evidently partial because of *their failure to take additional evidence* is contrary to the facts.

Br. in Opp. p. 11 relates Respondent submitted a Memorandum of Law at the arbitration hearing. He falsely stated in it: "The Respondent does admit selling securities to Claimant."

I had steadfastly denied that I ever sold securities to the Claimant, Ainsworth. Had the arbitrators' exhibit been permitted to be inserted in the record, the falseness of this accusation could be readily proven.

Br. in Opp. p. 12 states: "Judgment was entered by the district court for the amount of statutory damages proved by Ainsworth without contradiction by Skurnick in the arbitration." The arbitrators' exhibit placed in evidence already contained documentary proof that Ainsworth had invested a net amount of $1,100 and the account had a value of $12,000 at the time he terminated my management of it. Furthermore, Ainsworth at the hearing, confirmed to the arbitrators in sworn testimony that his net investment of $1,100 was accurate. For this reason I felt I would be wasting everyone's time if I attempted to prove that Ainsworth's claim for damages was without merit. I was before an arbitration tribunal where both parties agreed in advance to accept the arbitrators' decision as final. I was not in a court of law which was governed by the rules of law. I went as far as necessary to prove my case to the arbitration panel, which I accomplished as evidenced by their award.

Br. in Opp. p. 13 states: "Skurnick's initial brief raised issues on appeal that were not raised in the district court or in the arbitral hearing." Until the district court vacated the arbitration award and entered a judgment against me, I had no reason to raise the issues I raised in the appellate court.

In Br. of Opp. p. 14 Respondent quotes the appellate court as saying, "the district court had no difficulty with the issues in this case, nor do we, until confronting the issue of whether the subject sales were made in Florida." I submit that this statement by the appellate court is proof that the arbitrators did not act with *manifest disregard of the law.* One requirement of manifest disregard of the law by arbitrators is that the law must be pristine clear so that its interpretation would be clear to the average reasonable man. When three appellate judges state that they had difficulties determining whether the subject sales were made in Florida and had to ask the Florida Supreme Court to make that determination for them, their action is proof that the law on this point was not absolutely clear. One must remember that this was a claim to be settled by arbitrators and in accordance with their rules and procedures, and not in a court of law under court rules and court procedures.

Br. in Opp. p. 16 says, "Skurnick . . . . again has attempted to raise issues not before the trial court such as his due process argument arising under the Fifth Amendment to the United States Constitution . . ."

The trial before the district court was brought there under the authority of 9 U.S.C. § 10 which dealt solely with vacatur of an arbitration award, and "evident partiality" as well as "manifest disregard of the law" were the grounds upon which the vacatur of the arbitration award was sought. I was prepared to defend the arbitration award against these allegations. It was only *after* the trial when the judgment that was rendered against me by the district court did not conform to any of the grounds specified in 9 U.S.C. § 11, and did not conform to the intent of the arbitrators that I was made aware of the fact that my constitutional rights had been violated.

Reference is made to Respondent's reasons for denying the writ, Br. in Opp. pp. 16, 17.

Various circuit court decisions have set standards for vacating an arbitration award on the basis of manifest disregard of the law. Therefore, it was fitting to show that the district court's decision to vacate the arbitration award on this basis did not conform to the standards set by other circuits for such action, and that it did not conform to past rulings of the Eleventh Circuit as well. It was proper to demonstrate that the arbitration panel had a rational basis for saying that Ainsworth did not prove that I had violated Florida Statute § 517.12. Thus the Securities and Exchange Act of 1934 definitions which differentiated between brokers and dealers, and the established practice in the industry provided a reasonable basis for the arbitrators in believing that Ainsworth had not established the fact that I acted as a dealer in securities. These facts and other evidence were not presented to this Court to prove that I did not violate Florida statutes but rather to prove that the arbitrators made their award on a rational basis, and that their award was neither arbitrary or capricious. It was not sufficient for Ainsworth to prove that I sold stocks to him in Florida as a dealer, and was damaged as a result of my activities on his behalf. *He also had to prove that the arbitrators knew this as a fact, and then proceeded to ignore this fact.*

Respondent, the district court, and the Appellate Court while invoking Florida Statute 517.021(9) which states "broker" means "dealer" conveniently ignore 1985 Florida Statute 517.021(9)(b)5 that states a person buying stocks exclusively through a registered exchange is not a dealer. This is merely another reason for showing that the arbitration panel had a reasonable basis for stating that the Respondent had not established his claims. Br. in Opp. p. 16 states: "Both the decision of the district court and those of the Eleventh Circuit Court of Appeals reflect the undisputed facts upon which both courts based their decisions of which Skurnick complains." This statement ignores the fact that both courts were in conflict with

each other as to the reasons for vacating the arbitration award. The district court vacated the award on the allegation that it was in manifest disregard of the law, and specifically stated that the finding of "negligence" had no bearing on its decision. The Eleventh Circuit panel on the other hand justified the vacatur of the arbitration award for the reason that it was alleged to be "arbitrary or capricious," and they based their reason that the finding of negligence compelled the arbitrators to find that I had violated Florida Statute § 517.12. Thus we do not have in this case a so-called "two court" decision. We have instead two courts which are in conflict with each other.

Respondent has not presented one valid reason, one fact, or one applicable court decision which would justify his reasons for denying the writ.

Reference is made to Br. in Opp. p. 18, entitled "Conflict with Decision of this court," dealing with the statement by the district court that the award was capable of two very different interpretations. Taking into consideration that the Supreme Court has ruled that arbitrators need not give the reasons for their award, this Court can review the original award shown as Appendix J on page 29 of my petition and determine whether its mandate is absolutely clear, or lends itself to "two very different interpretations."

Br. in Opp. p. 18 erroneously attributes my reference to *Marshall v. Green Giant* as my basis for stating that the decision of the Eleventh Circuit panel is in "conflict with decisions of other courts of appeal."

In my comment on the decision of the Eleventh Circuit in the case of *O.R. Securities v. Professional Planning* I quoted the Eleventh Circuit's decision saying, "If a court is to vacate an arbitration award on the basis of manifest disregard of the law, there must be some showing in the record, other than the results obtained, that the arbitrators knew the law and expressly disregarded it." The court indicated that this was the opinion of other appellate courts, and for this reason the Eleventh

Circuit never adopted "manifest disregard of the law" as a standard for vacating an arbitration award.

Furthermore the decision of the Eleventh Circuit panel listed decisions by the Ninth Circuit, Eighth Circuit, Fourth Circuit, First Circuit, Tenth Circuit, and Second Circuit as setting standards for vacatur of an arbitration so difficult to meet that the Eleventh Circuit rejected that standard as a ground for vacating an arbitration award.

When the Eleventh Circuit panel affirmed the vacatur of the arbitration award by the district court on the grounds of manifest disregard of the law they deviated from past decisions of the Eleventh Circuit on this issue, as well as from the rulings of all the other circuits cited by them in their decision in which they stated, "Several courts have discussed the use of a 'manifest disregard of the law' standard to vacate an arbitration award." They then proceeded to list cases in the various other circuits listed above that was the basis for their rejection of the use of that standard as a ground for vacating an arbitration award.

Thus the Eleventh Circuit panel in its decision where they cited other circuit case rulings on the subject proved that their affirmation of the district court decision to vacate the arbitration award on the basis of manifest disregard of the law was in conflict with the rulings of the other circuits cited by them on this issue.

Br. in Opp. p. 20 in his *Amicizia* and *Diapulse* references erroneously implies that I have not acknowledged manifest disregard of the law as a basis for vacating an arbitration award. This is obviously untrue as I have quoted this Court in *Wilko v. Swan* as ruling that except for manifest disregard of the law, the grounds set forth in 9 U.S.C. § 10 are the only grounds for vacating an arbitration award. I have cited these cases, Diapulse in particular, to show that courts have ruled that 9 U.S.C. § 11, dealing with the modification of "an arbitration award, does not license a district court to substitute its judgment for that of the arbitrators."

Br. in Opp. p. 20 also erroneously alleges that the district court gave the arbitrators "specific instructions . . . as to the applicable law and the requirement to award damages but they chose not to do so." Respondent here merely repeats the erroneous statement by the Eleventh Circuit panel. This Court can readily determine the facts by referring to the district court's decision in appendix B of my brief. The decision includes the court's order of remand. I have found no instructions there which required the arbitrators "to award damages" to the Respondent.

Br. in Opp. pp. 22, 23, cites the Eleventh Circuit panel's decision which was fully analyzed and argued in my brief. There is no need to prove again the panel's misapprehensions concerning negligence, alleged damages, and alleged instructions given the arbitrators by the district court. Br. in Opp. p. 24 states, "Simply put, arbitrators cannot be allowed to act in an arbitrary and capricious manner." In his entire brief he has never once presented an act, or statement by the arbitrators that the average reasonable person would classify as "arbitrary or capricious." Respondent knows very well that Florida Statute § 517.12 makes no reference to "negligence," and that the panel's misapprehension of that statute was the basis for ruling that the arbitration award was "arbitrary or capricious."

Br. in Opp. pp. 23, 24, states: ". . . it is apparent that the requirements to vacate an arbitration in the Eleventh Circuit are more stringent than in those Circuits that have adopted the manifest disregard of the law standard." That may or may not be so. This Court may have noted that in my brief, and in this reply, I have always referred to the Eleventh Circuit *panel*. After studying the Eleventh Circuit's decisions in their previous arbitration cases, I concluded that the decisions rendered were rational, and on an intellectual level that showed care and a sense of responsibility in their preparation. The decisions of the panel in this case showed such negligence in ascertaining the facts and the laws involved, and in

their reasoning that it would be unfair to the other justices of the Eleventh Circuit to hold them responsible for this panel's malfeasance, or to associate them with this panel's decision. For good cause I filed the required fifteen (15) copies of a suggestion for rehearing in banc, out of time. Fourteen (14) were returned to me after I was informed that they were not distributed to the justices of the Eleventh Circuit for their consideration. I believe that had the justices of the Eleventh Circuit had the opportunity to act on my in banc suggestion, they would have granted me a rehearing. My belief is based upon my analysis of their previous arbitration decisions.

Br. in Opp. p. 24 in his section, "Issues Raised But Not Argued" states that ". . . three separate courts have heard and considered the issues in this case . . ." Apparently, the Respondent is relying on the quantity of courts rather than the quality of their decision and of his facts and arguments.

I have previously discussed the conflicts between the decisions of the district court and the Eleventh Circuit panel. The differences were so great that it would be fair to say they agreed on nothing of significance.

In his "Conclusion," Respondent's authorities appear to be those of the courts whose decisions are being appealed. He has presented no valid argument or fact to support his conclusion.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition for certiorari, certiorari should be granted.

Respectfully submitted,

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